

TAB 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL) MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION
PRICE LITIGATION) 01-CV-12257-PBS

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THIS DOCUMENT RELATES TO)
United States of America, et al.,) Judge Patti B.
Ven-a-Care of the Florida Keys,) Saris
Inc.,)
vs.)
Boehringer Ingelheim, Corp.,) Chief Magistrate
et al.) Judge Marianne B.
Civil Action 07-10248-PBS) Bowler

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(Cross-caption appears on following page)

VIDEOTAPED DEPOSITION OF SHELDON BERKLE

VOLUME I

Naples, Florida

Friday, October 31, 2008

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<p>1 Altus?</p> <p>2 A. May 2005.</p> <p>3 Q. Prior to that time where did you work?</p> <p>4 A. Just prior to that I had been retired</p> <p>5 for just over a year, and prior to that with</p> <p>6 Boehringer Ingelheim in the United States, and</p> <p>7 prior to that in Canada.</p> <p>8 Q. When you say Boehringer Ingelheim in</p> <p>9 the United States, do you mean Boehringer</p> <p>10 Ingelheim Pharmaceuticals, Incorporated?</p> <p>11 A. Correct.</p> <p>12 Q. Is it okay if we refer to that</p> <p>13 sometimes today as BIPI?</p> <p>14 A. Yes.</p> <p>15 Q. Is BIPI part of a larger family of</p> <p>16 companies?</p> <p>17 MR. GASTWIRTH: Objection to form.</p> <p>18 THE DEPONENT: Yes, it is.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Is that -- Is it okay if I call that</p> <p>21 sometimes the Boehringer Ingelheim family of</p> <p>22 companies?</p>	<p>1 A. Yes, there was.</p> <p>2 Q. When was that?</p> <p>3 A. It was November 1994.</p> <p>4 Q. And when did you stop working for</p> <p>5 Boehringer Ingelheim's American operations?</p> <p>6 A. The end of 2003.</p> <p>7 Q. Upon transfer to the U.S., which</p> <p>8 specific entity did you work for?</p> <p>9 A. BIPI.</p> <p>10 Q. BIPI. What was your position there?</p> <p>11 A. Executive vice president.</p> <p>12 Q. Executive vice president.</p> <p>13 Did you have -- Did you have a position</p> <p>14 at any other Boehringer Ingelheim entities in</p> <p>15 America at that time?</p> <p>16 MR. GASTWIRTH: Objection to form.</p> <p>17 THE DEPONENT: I was a vice president</p> <p>18 for BI Corporation.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Is it okay if we refer to that as BIC?</p> <p>21 A. Sure.</p> <p>22 Q. What about a company known as Roxane</p>
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<p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: Are you referring to the</p> <p>3 U.S. family or to the worldwide family?</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. To the worldwide family I guess. If I</p> <p>6 -- If I use Boehringer Ingelheim family, I'm</p> <p>7 talking about the whole broad --</p> <p>8 A. The whole shebang.</p> <p>9 Q. The whole shebang.</p> <p>10 A. That's fine.</p> <p>11 Q. When did your employment begin with any</p> <p>12 Beohringer entity and the Beohringer Ingelheim</p> <p>13 family of companies?</p> <p>14 A. 1973.</p> <p>15 Q. With what entity?</p> <p>16 A. Boehringer Ingelheim Canada.</p> <p>17 Q. And obviously that's a Canadian</p> <p>18 company?</p> <p>19 A. Correct.</p> <p>20 Q. Was there a point in time when you</p> <p>21 transferred to Boehringer Ingelheim's American</p> <p>22 operations?</p>	<p>1 Laboratories, did you have a position with them?</p> <p>2 MR. GASTWIRTH: Objection to form.</p> <p>3 THE DEPONENT: No.</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. Can you describe in general the</p> <p>6 business of BIPI in the 1994 time frame. By</p> <p>7 business I mean, among other things, what types</p> <p>8 of products was the company marketing or selling?</p> <p>9 A. Again, it was involved in the research;</p> <p>10 basic research, clinical research and marketing</p> <p>11 sales of human pharmaceuticals. It was a</p> <p>12 relatively smaller company in the U.S.</p> <p>13 pharmaceutical business. And we were involved in</p> <p>14 a couple therapeutic areas at that point,</p> <p>15 respiratory medicine predominantly.</p> <p>16 Q. Were most of BIPI's products branded</p> <p>17 drugs or generic drugs?</p> <p>18 A. Branded drugs.</p> <p>19 Q. Can you describe the business of BIC at</p> <p>20 about the same time, the 1994 time frame.</p> <p>21 A. My understanding of what BIC was was</p> <p>22 really as a holding company for the U.S.</p>

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<p>1 Q. Is it fair to say that BIC didn't have 2 any active business of its own?</p> <p>3 A. Correct.</p> <p>4 Q. Can you -- Are you familiar with a 5 company known as Roxane Laboratories?</p> <p>6 A. Yes, I am.</p> <p>7 Q. Can you describe their business 8 generally.</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: My understanding of 11 Roxane is that its predominant business was 12 involved in the generic or multi-source business.</p> <p>13 BY MR. FAUCI:</p> <p>14 Q. When you use the term "multi-source", 15 is that -- is that a synonym for generic?</p> <p>16 A. Yes.</p> <p>17 Q. Did Roxane also have a different -- 18 another type of product known within Roxane as 19 branded generic?</p> <p>20 A. Yes, they did.</p> <p>21 MR. GASTWIRTH: Objection to form.</p> <p>22 BY MR. FAUCI:</p>	<p>1 Q. Thank you.</p> <p>2 You said earlier that BIC is something 3 like a holding company?</p> <p>4 A. Yes.</p> <p>5 MR. GASTWIRTH: Objection to form.</p> <p>6 BY MR. FAUCI:</p> <p>7 Q. Can you tell me the relationship 8 between BIC and BAPI.</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: Again, BAPI was a 11 division of BIC. There were multiple divisions 12 within the United States.</p> <p>13 BY MR. FAUCI:</p> <p>14 Q. Do you consider -- Strike that.</p> <p>15 I'm going to show you a document that 16 the court reporter has marked as Exhibit 2. (Exhibit Berkley 002 was marked.)</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. Do you recognize this document?</p> <p>19 A. Not specifically, no, I do not.</p> <p>20 Q. Please read the -- the top of the 21 document I read it says job description; is that</p>
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<p>1 BY MR. FAUCI:</p> <p>2 Q. Take a moment to familiarize yourself</p> <p>3 with the document. Whenever you're ready, you</p> <p>4 can tell me if you recognize this document.</p> <p>5 A. That's fine.</p> <p>6 Q. Do you recognize this document?</p> <p>7 A. Not specific. You know, I can't</p> <p>8 remember it specifically.</p> <p>9 Q. Do you see in the upper left-hand</p> <p>10 corner it says employee bulletin?</p> <p>11 A. Yes, I do.</p> <p>12 Q. Which company issued this employee</p> <p>13 bulletin?</p> <p>14 MR. GASTWIRTH: Objection to form.</p> <p>15 THE DEPONENT: I really don't know.</p> <p>16 BY MR. FAUCI:</p> <p>17 Q. Do you know whether this employee</p> <p>18 bulletin would have been sent to BIPI employees?</p> <p>19 A. I would assume it was.</p> <p>20 Q. Do you know whether it would have been</p> <p>21 sent to Roxane employees?</p> <p>22 MR. GASTWIRTH: Objection to form.</p>	<p>1 Q. Including Roxane?</p> <p>2 A. Including Roxane.</p> <p>3 Q. Did you report to Mr. Gerstenberg?</p> <p>4 A. Yes, I did.</p> <p>5 Q. Was there anyone in between you and Mr.</p> <p>6 Gerstenberg in the hierarchy of the corporation</p> <p>7 or were you pretty much directly reporting to</p> <p>8 him?</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: I reported directly to</p> <p>11 Mr. Gerstenberg.</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. On the first page in the fourth</p> <p>14 paragraph down, can you just read the first</p> <p>15 sentence into the record.</p> <p>16 A. Starting with Shelly's duties?</p> <p>17 Q. Yes. Thank you.</p> <p>18 A. Shelly's duties will mainly focus on</p> <p>19 the strategic alignment of our ethical</p> <p>20 pharmaceutical business in the U.S. and he will</p> <p>21 be responsible for the operating result for this</p> <p>22 area.</p>
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<p>1 THE DEPONENT: It's possible.</p> <p>2 BY MR. FAUCI:</p> <p>3 Q. Do you have any reason to believe it</p> <p>4 wasn't sent to Roxane employees?</p> <p>5 A. I don't know whether it was or wasn't</p> <p>6 to be honest with you.</p> <p>7 Q. Do you see at the second page that this</p> <p>8 document was signed by--I might mispronounce his</p> <p>9 name--Werner Gerstenberg?</p> <p>10 A. Yes. And that's correct by the way.</p> <p>11 Q. Thank you.</p> <p>12 Who is Mr. Gerstenberg?</p> <p>13 A. Mr. Gerstenberg was the CEO of</p> <p>14 Boehringer in the United States.</p> <p>15 Q. And by Boehringer in the United States,</p> <p>16 do you mean BIPI?</p> <p>17 A. I mean all the divisions. The total</p> <p>18 company.</p> <p>19 Q. So was he the CEO of BIC?</p> <p>20 A. You know, again, I don't know what the</p> <p>21 legal aspects were, but he was basically the</p> <p>22 overall country manager for the United States.</p>	<p>1 Q. What is the strategic alignment of our</p> <p>2 ethical pharmaceutical business?</p> <p>3 A. Again, I think it is relative to what</p> <p>4 we have spoken about before. For those products</p> <p>5 being used for the treatment of diseases in human</p> <p>6 beings. So for -- again, on the strategic level</p> <p>7 for products marketed within BIPI and Roxane</p> <p>8 Laboratories.</p> <p>9 Q. In the next sentence it states, As in</p> <p>10 other countries business will develop in line</p> <p>11 with the strategy of the strategic business unit</p> <p>12 (SBU) ethical pharmaceuticals BIGmbH. What is</p> <p>13 the strategic business unit ethical</p> <p>14 pharmaceuticals BIGmbH?</p> <p>15 A. Again, on a global basis Boehringer was</p> <p>16 organized within a business unit framework. So</p> <p>17 as we've talked about a business unit --</p> <p>18 strategic business unit in the United States, you</p> <p>19 can expand that from various operative units</p> <p>20 around the world into the parent company which</p> <p>21 had a head of strategic business unit ethical</p> <p>22 pharmaceuticals.</p>

<p style="text-align: right;">50</p> <p>1 Q. If you'd turn to page two.</p> <p>2 A. Yeah.</p> <p>3 Q. The first paragraph. The first</p> <p>4 sentence says, In order to create a unified</p> <p>5 management for our ethical pharmaceutical</p> <p>6 business in the U.S., Edward Tupa, vice president</p> <p>7 sales and marketing, Roxane Laboratories, and</p> <p>8 Fred Duy -- Is that correct?</p> <p>9 A. Correct.</p> <p>10 Q. -- vice president business planning and</p> <p>11 development also of Roxane Laboratories will</p> <p>12 report to Shelly.</p> <p>13 A. Will report functionally to Shelly.</p> <p>14 Q. Will report functionally to Shelly.</p> <p>15 Thank you.</p> <p>16 A. Key word.</p> <p>17 Q. Who is Mr. Tupa?</p> <p>18 A. Mr. Tupa worked within the Roxane</p> <p>19 business entity.</p> <p>20 Q. Do you know what his responsibilities</p> <p>21 were at Roxane?</p> <p>22 A. Responsible as it says here for sales</p>	<p>1 development. So really looking at opportunities</p> <p>2 for new business within the Roxane business</p> <p>3 entity.</p> <p>4 Q. The employee bulletin states that you</p> <p>5 were the executive vice president of BIPI.</p> <p>6 A. Correct.</p> <p>7 Q. And it also says that you were a vice</p> <p>8 president of BIC; is that correct?</p> <p>9 A. Correct.</p> <p>10 Q. How were these -- Were there different</p> <p>11 job responsibilities as executive vice president</p> <p>12 of BIPI and vice president of BIC, or were they</p> <p>13 the same type of responsibilities?</p> <p>14 MR. GASTWIRTH: Objection to form.</p> <p>15 THE DEPONENT: Again, my primary</p> <p>16 responsibility was within BIPI. You know, and</p> <p>17 again, I reemphasize that it was directed towards</p> <p>18 growing the branded business within BIPI.</p> <p>19 BIC really -- I would define it as a</p> <p>20 holding company. And I was an officer within</p> <p>21 BIC, but BIC really didn't have a direct</p> <p>22 business, as we've talked about before.</p>
<p style="text-align: right;">51</p> <p>1 and marketing of Roxane products.</p> <p>2 Q. Would that include multi-source</p> <p>3 products?</p> <p>4 A. Yes.</p> <p>5 Q. Would it include branded generic</p> <p>6 products?</p> <p>7 A. Yes.</p> <p>8 Q. What does it mean that Mr. Tupa</p> <p>9 reported functionally to you?</p> <p>10 A. Basically that means there was a dotted</p> <p>11 line responsibility to me and a direct report and</p> <p>12 responsibility to the president of Roxane</p> <p>13 Laboratories.</p> <p>14 Q. A dotted line responsibility. Can you</p> <p>15 explain what that means.</p> <p>16 A. Again, I go back to what I've said</p> <p>17 before. I really had a strategic involvement</p> <p>18 with Roxane, not an operational day-to-day</p> <p>19 involvement.</p> <p>20 Q. And Fred Duy, can you tell me a little</p> <p>21 bit more about his responsibilities.</p> <p>22 A. Basically, as it says here, business</p>	<p>1 BY MR. FAUCI:</p> <p>2 Q. Were you an officer at any other -- any</p> <p>3 other Boehringer Ingelheim companies besides BIPI</p> <p>4 and BIC?</p> <p>5 MR. GASTWIRTH: Objection to form.</p> <p>6 THE DEPONENT: No.</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. Which company paid your salary?</p> <p>9 A. I believe it was BIPI that paid my</p> <p>10 salary.</p> <p>11 Q. Did you receive a salary from BIC?</p> <p>12 A. No.</p> <p>13 Q. Did you sit on any boards of directors</p> <p>14 for Boehringer Ingelheim companies?</p> <p>15 MR. GASTWIRTH: Objection to form.</p> <p>16 THE DEPONENT: The only board -- The</p> <p>17 only direct position I believe I had was with --</p> <p>18 was with Roxane Laboratories.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Do you know approximately how long you</p> <p>21 served on the Roxane board?</p> <p>22 A. Off the top of my head I can't</p>

<p>58</p> <p>1 A. I -- A slight variation of that. I 2 think this refers to the Roxane component of the 3 strategic business unit. It doesn't refer to the 4 BIPI component, which is purely branded.</p> <p>5 Q. So there was --</p> <p>6 A. Really three.</p> <p>7 Q. I'm sorry. What do you mean by really 8 three?</p> <p>9 A. Again, this is -- this refers only to 10 Roxane Laboratories.</p> <p>11 Q. Okay.</p> <p>12 A. Okay? That's --</p> <p>13 Q. And so there was a Roxane Laboratories 14 component of the business unit?</p> <p>15 A. Yes. According to -- According to this 16 anyway definition.</p> <p>17 Q. The third sentence down in the same 18 paragraph it says, Sales and marketing for 19 branded generics will report to BIPI 20 counterparts. Are branded generics, are those 21 Roxane products?</p> <p>22 A. Yes, they were.</p>	<p>60</p> <p>1 And as I think we talked about 2 previously in the document, just slightly above 3 that particular line, there's two components of 4 the Roxane business, multi-source generic and 5 branded generic.</p> <p>6 So for the branded generic products 7 there was only a few of them. Those people 8 within the Roxane business entity did report 9 functionally to designated people within the BIPI 10 organization, but the day-to-day operations were 11 still conducted by Roxane people.</p> <p>12 Q. Okay. The last sentence of this same 13 paragraph reads, The contracting and pricing 14 departments will be combined for ROI and BIPI. 15 Do you recall if this -- if this happened?</p> <p>16 A. This happened really from the 17 administrative perspective, so that there was -- 18 you know, the actual establishment of pricing or 19 contracting was done by individuals within the 20 Roxane business entity, but the processing of the 21 administration, the submission of prices, were 22 done by a central unit within -- within BIPI that</p>
<p>59</p> <p>1 Q. Why are Roxane sales and marketing 2 reporting to their BIPI counterparts?</p> <p>3 MR. GASTWIRTH: Objection to form. 4 That's not what this document says.</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. Well, I can -- Let's just look at the 7 sentence. It says, Sales and marketing for 8 branded generics will report to BIPI 9 counterparts. Can you tell me what -- what you 10 think that sentence means?</p> <p>11 A. Well, I can tell you what the situation 12 actually was.</p> <p>13 Q. Okay. That's --</p> <p>14 A. Okay. And -- And again, because I 15 certainly can't recall having seen this document, 16 and I certainly didn't write this document.</p> <p>17 The situation was that there were 18 people within the Roxane organization, within the 19 Roxane business unit, business entity that had 20 responsibility for the day-to-day operations and 21 the various functions, including marketing and 22 sales.</p>	<p>61</p> <p>1 had that responsibility for both BIPI and Roxane.</p> <p>2 Q. Why were they combined in this way?</p> <p>3 A. Again, it was -- it was a synergistic 4 decision in the sense of rather than having two 5 separate organizations making submissions it made 6 sense to -- from an efficiency point of view to 7 combine that.</p> <p>8 Q. And submissions to who?</p> <p>9 A. To wherever, you know, pricing or 10 contract -- contracts had to be submitted to.</p> <p>11 MR. FAUCI: I think it's a good time 12 for a quick break.</p> <p>13 THE DEPONENT: Sure.</p> <p>14 THE VIDEOGRAPHER: It's 9:59. We're 15 going off the record.</p> <p>16 (Short break was taken.)</p> <p>17 (Exhibit Berkle 005 was marked.)</p> <p>18 THE VIDEOGRAPHER: It's 10:24. We're 19 back on the record.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Welcome back, Mr. Berkle.</p> <p>22 A. Thank you.</p>

<p style="text-align: right;">74</p> <p>1 MR. GASTWIRTH: I'm -- And just to 2 respond to that commentary by counsel, I'm not 3 instructing the witness not to answer these 4 questions, I'm just objecting to the extent that 5 questions are being asked about documents that 6 were not provided to the witness about his 7 understanding of terms or phrases within 8 documents he's never seen before.</p> <p>9 MR. BREEN: You're giving this witness 10 the answer. It's improper and I object to it.</p> <p>11 MR. GASTWIRTH: Okay.</p> <p>12 THE DEONENT: Could you repeat the 13 question.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. Sure. The language I read, the bolded 16 language in paragraph three --</p> <p>17 A. Uh-huh. Right.</p> <p>18 Q. -- does that language -- do you 19 understand -- can you tell me what you understand 20 that language to mean?</p> <p>21 A. Yeah. How do I -- How do I answer 22 that? You know, I read it. I under -- you know,</p>	<p>1 made a larger profit margin when he or she 2 dispensed a Roxane product?</p> <p>3 MR. GASTWIRTH: Objection to form.</p> <p>4 THE DEONENT: As I said before, I was 5 not involved in the day-to-day operations of 6 Roxane or in basically how they set their prices 7 in general or how they marketed their generic 8 drugs. I really did not get involved. So I am 9 not aware whether they did or didn't do the type 10 of thing that you said.</p> <p>11 BY MR. FAUCI:</p> <p>12 Q. And I'll ask a similar question. Do 13 you recall if Roxane ever promoted the profit 14 margin available on its products as a reason for 15 a pharmacist to dispense the product?</p> <p>16 MR. GASTWIRTH: Objection.</p> <p>17 THE DEONENT: I'm not aware of that.</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Are you familiar with the 20 pharmaceutical product known as Ipratropium 21 Bromide?</p> <p>22 A. Yes, I am.</p>
<p style="text-align: right;">75</p> <p>1 based on what it says here -- You know, I'm just 2 going to repeat what it says. It says that the - 3 - a pharmacy is reimbursed by the payer on a 4 formula AWP less a defined percentage plus a 5 dispensing fee. So ultimately the money that 6 goes to the pharmacy.</p> <p>7 Now, other than reading it and taking 8 it exactly what it says, I don't know whether 9 it's right or wrong or -- you know, I certainly 10 don't offer any other opinion beyond what the 11 actual words say.</p> <p>12 Q. Did Roxane ever set AWPs for its 13 products to ensure that a pharmacist made a 14 larger profit margin when he or she dispensed the 15 Roxane product?</p> <p>16 MR. GASTWIRTH: Objection. Can I hear 17 that question back for a second, please.</p> <p>18 THE COURT REPORTER: Actually, Counsel, 19 can you repeat that.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Sure. Do you know if Roxane ever set 22 AWPs for its products to ensure that a pharmacist</p>	<p style="text-align: right;">77</p> <p>1 Q. What is that?</p> <p>2 A. Ipratropium Bromide is a human 3 pharmaceutical product that was originated within 4 Boehringer research and marketed as an original 5 brand named Atrovent marketed by BIPI in the 6 United States. It is used in the treatment of 7 chronic obstructive lung disease.</p> <p>8 Q. Is Atrovent a BIPI product?</p> <p>9 A. Yes, it is.</p> <p>10 Q. And is it fair to characterize Atrovent 11 as a branded product?</p> <p>12 A. Yes, it is.</p> <p>13 Q. And Ipratropium Bromide, is it fair to 14 say that's a generic equivalent of Atrovent?</p> <p>15 A. Yes, it is.</p> <p>16 Q. Were you involved in any way in making 17 decisions about the marketing or pricing of 18 Ipratropium Bromide?</p> <p>19 MR. GASTWIRTH: Objection to form.</p> <p>20 THE DEONENT: You're talking about the 21 generic version?</p> <p>22 BY MR. FAUCI:</p>

<p>122</p> <p>1 A. No.</p> <p>2 Q. Who -- Have you seen this document?</p> <p>3 A. I can't recall.</p> <p>4 Q. Do you have any reason to believe that</p> <p>5 you didn't see it?</p> <p>6 A. I can't answer that yes or no.</p> <p>7 Q. Is it -- This is a marketing plan for</p> <p>8 Ipratropium Bromide; is that correct?</p> <p>9 A. It appears to be.</p> <p>10 Q. Is it likely you would have been sent a</p> <p>11 copy of a document like that?</p> <p>12 MR. GASTWIRTH: Objection to form.</p> <p>13 THE DEPONENT: It's possible.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. I'm going to direct your attention to</p> <p>16 page five. It's the internal page numbers.</p> <p>17 There's a bunch of Bates numbers below, but --</p> <p>18 A. Right. Yeah.</p> <p>19 Q. It says pricing. Do you see that?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Can you read me the first two</p> <p>22 sentences.</p>	<p>124</p> <p>1 is to create an attractive spread between WAC and</p> <p>2 AWP encouraging accounts to convert from the</p> <p>3 brand name to the generic product as quickly as</p> <p>4 possible.</p> <p>5 Do you have any reason to dispute that</p> <p>6 the purpose of the pricing structure was as it is</p> <p>7 stated in the marketing plan; i.e., to create an</p> <p>8 attractive spread between the WAC and AWP</p> <p>9 encouraging accounts to convert from the brand</p> <p>10 name to the generic product as quickly as</p> <p>11 possible?</p> <p>12 MR. GASTWIRTH: Objection to form.</p> <p>13 THE DEPONENT: Yeah. The only comment</p> <p>14 I'll make to that is that, you know, certainly my</p> <p>15 understanding was -- on pricing for Roxane was to</p> <p>16 ensure that they were competitive. Beyond that</p> <p>17 I'm not prepared to make any comments.</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Would you have approved of this plan</p> <p>20 had you seen that the stated reason for the</p> <p>21 pricing structure was to create an attractive</p> <p>22 spread between WAC and AWP?</p>
<p>123</p> <p>1 A. Under pricing?</p> <p>2 Q. Yes.</p> <p>3 A. Pricing of the IB UDV will need to</p> <p>4 follow the traditional parameters of a generic</p> <p>5 product. Specifically AWP will be brand less 10</p> <p>6 percent or \$44.06 for the 25-count package. WAC</p> <p>7 will be AWP less 40 percent or \$26.44 for the 25-</p> <p>8 count package.</p> <p>9 Q. Is that -- Is it your under -- In your</p> <p>10 understanding is it typical that the AWP for a</p> <p>11 generic product would be AW -- would be brand</p> <p>12 less 10 percent?</p> <p>13 MR. GASTWIRTH: Objection to form.</p> <p>14 THE DEPONENT: Again, my familiarity</p> <p>15 was primarily with the branded products where we</p> <p>16 set a wholesale acquisition cost and that I</p> <p>17 cannot tell you what precisely is common relative</p> <p>18 to AWP which from my perspective was familiar --</p> <p>19 was more associated with generic drugs.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. The next sentence, The reason this type</p> <p>22 of price structure is used for a generic launch</p>	<p>125</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: I'm not going to</p> <p>3 speculate on that. In general I've said to you</p> <p>4 before that I really did not get involved in the</p> <p>5 details of pricing for the generic products</p> <p>6 within the Roxane line.</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. I think we're going to move on from</p> <p>9 that document.</p> <p>10 A. Okay.</p> <p>11 MR. FAUCI: It is 11:57. I'm happy to</p> <p>12 keep going. Lunch isn't here.</p> <p>13 MR. GASTWIRTH: That would be fine.</p> <p>14 MR. FAUCI: Stop whenever people are</p> <p>15 ready.</p> <p>16 BY MR. FAUCI:</p> <p>17 Q. I'm going to show you a document the</p> <p>18 court reporter will mark as Exhibit 15.</p> <p>19 (Exhibit Berkle 015 was marked.)</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Please take a moment.</p> <p>22 A. Okay.</p>

<p>126</p> <p>1 Q. Have you seen this document?</p> <p>2 A. I don't recall.</p> <p>3 Q. It looks like an early version of an e-mail.</p> <p>4 A. You're right.</p> <p>5 Q. It seems to be from Jim King. Regards,</p> <p>6 Jim King. Do you see that at the bottom?</p> <p>7 A. Yes, I do.</p> <p>8 Q. Who's Jim King?</p> <p>9 A. Jim King was vice president of sales reporting to me.</p> <p>10 Q. For BIPI?</p> <p>11 A. For BIPI. For BIPI, sorry.</p> <p>12 Q. Did he have responsibility for Roxane as well?</p> <p>13 A. No, he did not.</p> <p>14 Q. In the "to" line it's to a bunch of different groups it seems; all RDs. What does that mean?</p> <p>15 A. Regional directors that would have been reporting directly to Jim King.</p> <p>16 Q. Would they be in the trade relations</p>	<p>128</p> <p>1 see that?</p> <p>2 A. Yes, I do.</p> <p>3 Q. I'm going to look at the second paragraph.</p> <p>4 A. Uh-huh.</p> <p>5 Q. Just so you are clear on sales commissions, if Roxane's Ipratropium Bromide is sold or if an Atrovent solution is sold, you get credit for it. It is in the corporation's best interest to shift business to Roxane as quickly as possible.</p> <p>6 Did sales personnel -- BIPI sales personnel get credit for sales whether or not they were BIPI products or Roxane products?</p> <p>7 MR. GASTWIRTH: Objection to form.</p> <p>8 THE DEPONENT: I can only --</p> <p>9 BY MR. FAUCI:</p> <p>10 Q. Go ahead.</p> <p>11 A. I can only say according to this they did.</p> <p>12 Q. Do you have any reason to believe they didn't?</p>
<p>127</p> <p>1 group?</p> <p>2 A. No.</p> <p>3 Q. What -- What group would they be in?</p> <p>4 Where do they fall in the company?</p> <p>5 A. What's called the sales group.</p> <p>6 Basically responsible for medical representatives calling on physicians.</p> <p>7 Q. And those people, would they be BIPI employees?</p> <p>8 A. Yes, they would.</p> <p>9 Q. And they would be responsible just for BIPI products?</p> <p>10 A. Yes.</p> <p>11 Q. What about DMs?</p> <p>12 A. DM stands for direct managers and they report to the regional directors.</p> <p>13 Q. And then reps?</p> <p>14 A. Reps are individual sales reps reporting to the DMs.</p> <p>15 Q. And all these people are BIPI?</p> <p>16 A. Yes, they are.</p> <p>17 Q. Subject, Atrovent IB solution. Do you</p>	<p>129</p> <p>1 A. No, I don't.</p> <p>2 Q. Had you seen this e-mail or known of this, would you have approved of BIPI people getting credit for Roxane sales?</p> <p>3 A. I would have been aware of it and I would have approved it.</p> <p>4 Q. You would have approved it?</p> <p>5 A. Yeah. The reason being is that -- and again, I'm making certain assumptions here, that this was during only -- this was only for a period of time. Okay. And this was the period of time when Roxane was preemptively launching Ipratropium Bromide.</p> <p>6 Okay. So the agreement was that</p> <p>7 Boehringer medical reps would still be promoting the compound to physicians and to hospital</p> <p>8 physicians, therefore, trying to grow the market</p> <p>9 penetration of Ipratropium within the respiratory</p> <p>10 marketplace.</p> <p>11 And because they were putting an effort</p> <p>12 but allowing -- but allowing Roxane to sell a</p> <p>13 generic version during that exclusive period that</p>

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<p>1 BY MR. FAUCI:</p> <p>2 Q. Who was that? Do you recall who the</p> <p>3 CFO was?</p> <p>4 A. At that -- I don't know what -- What's</p> <p>5 the date here?</p> <p>6 Q. I think the date is around the 1998</p> <p>7 time frame. Signed 8/25/98.</p> <p>8 A. Probably Holger Huels.</p> <p>9 Q. And just for the record it was signed</p> <p>10 by the wholesaler on 8/25/98 and by Roxane Labs</p> <p>11 on 10/28/98.</p> <p>12 A. Gotcha.</p> <p>13 Q. Moving on. I'm going to mark as</p> <p>14 Exhibit 26 -- I shouldn't do that, let the court</p> <p>15 reporter do that.</p> <p>16 (Exhibit Berkle 026 was marked.)</p> <p>17 MR. FAUCI: Just so counsel for the</p> <p>18 Defendant knows, this is an amended notice of</p> <p>19 deposition.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Have you ever seen this document? Feel</p> <p>22 free to read it.</p>	<p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: The Texas case was after</p> <p>3 I had retired from BIPI.</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. When you left, were you -- That's fine.</p> <p>6 The question is, when you left, did anybody tell</p> <p>7 you that you should look through your documents</p> <p>8 and set aside certain documents?</p> <p>9 A. No.</p> <p>10 MR. GASTWIRTH: Objection to form.</p> <p>11 BY MR. FAUCI:</p> <p>12 Q. What number was that, 26?</p> <p>13 A. 26, yeah.</p> <p>14 Q. I'm going to show you a document which</p> <p>15 the court reporter will mark as 27.</p> <p>16 (Exhibit Berkle 027 was marked.)</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. Take a moment to familiarize yourself.</p> <p>19 A. Okay.</p> <p>20 Q. Turning to the second page.</p> <p>21 A. All right.</p> <p>22 Q. Actually just go to the back. There's</p>
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<p>186</p> <p>1 Q. As we are all aware, we have taken 2 several steps in the past two years to increase 3 the level of business unit collaboration and 4 focus across organizations; e.g., business unit 5 operating committee, ethical pharmaceutical 6 committee.</p> <p>7 Would you agree that -- Is that your 8 recollection now that over the past two years 9 leading up to 1998 you took several steps to 10 increase the level of business unit 11 collaboration?</p> <p>12 A. Again, the goal would be to create eff 13 -- efficiencies and synergies where it made 14 sense. However, Roxane and BIPI were always 15 separate entities, they were always separate 16 management within each entity and the day-to-day 17 business for each of those entities was done 18 within that entity.</p> <p>19 Q. It says, The changes I will describe in 20 this announcement build on this foundation. 21 These changes also are designed to build on the 22 strengths of Boehringer Ingelheim</p>	<p>188</p> <p>1 strengthening the synergy between our solid 2 liquid dosage and injectable multi-source 3 businesses. Is that what you talked about 4 earlier with Ben Venue being an injectable 5 company?</p> <p>6 A. Correct. So the solid liquid dose was 7 -- referred to Roxane and the injectable referred 8 to Ben Venue.</p> <p>9 Q. It says, I've asked Tom Russillo to 10 take on this critical and complex challenge. 11 Multi-source marketing within RLI, Roxane, now 12 will report to Tom. Who's Tom Russillo?</p> <p>13 A. Tom Russillo was president of Ben Venue 14 Laboratories and obviously with this change took 15 over responsibility for the multi-source business 16 within Roxane as well.</p> <p>17 Q. Was Tom Russillo at Ben Venue prior to 18 its acquisition by the Boehringer Ingelheim 19 family?</p> <p>20 A. Yes, he was.</p> <p>21 Q. Do you know if Russillo came to work 22 for Roxane?</p>
<p>187</p> <p>1 Pharmaceuticals, Inc., BIPI, Roxane Laboratories 2 and Ben Venue Laboratories while achieving much 3 greater synergy across the entire business unit. 4 Do you see that?</p> <p>5 A. Yes, I do.</p> <p>6 Q. We've talked about synergy a bit 7 earlier today. What does it mean to increase the 8 synergy across the entire business unit?</p> <p>9 A. Again, to do away with wasted effort in 10 the sense that you have duplication of -- of 11 effort in various functions. And where it made 12 sense to amalgamate services that were common to 13 the various companies and divisions, then we 14 attempted to do that. But, again, the day-to-day 15 operations for each of those businesses was 16 conducted and carried out by management within 17 those divisions.</p> <p>18 Q. If you look at the next page, the first 19 bullet point.</p> <p>20 A. Okay.</p> <p>21 Q. We want to expand our important multi- 22 source business by capitalizing on and</p>	<p>189</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: I believe he was a Ben 3 Venue employee, but you would have to check that 4 with people more in the know than I.</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. But it's fair to say regardless of who 7 he formally worked for that Roxane employees 8 reported to him?</p> <p>9 A. Yes.</p> <p>10 Q. I'm going to look down at another 11 bullet point. It says, To ensure that we are 12 bringing BIPI's medical and drug regulatory 13 affairs' knowledge to bear on both our multi- 14 source and specialty products, Roxane's, or 15 RLI's, medical and drug regulatory affairs' 16 current product will report with Doug Wilson's 17 BIPI medical/DRA organization. What are the 18 medical and drug regulatory affairs departments?</p> <p>19 A. Again, these are the people within that 20 organization that are responsible for conducting 21 clinical research and for liaising with the FDA.</p> <p>22 Q. It says that RLI's medical and drug</p>

<p>190</p> <p>1 regulatory affairs will report within Doug 2 Wilson's BIPI/DRA organization. Why was that? 3 A. Again, in order to create efficiencies. 4 Q. What type of efficiencies could that 5 create? 6 A. BIPI had a large department, you know, 7 consisting of many more physicians, 8 statisticians, et cetera. So it would allow 9 Roxane -- people responsible for these areas to 10 tap into the larger BIPI medical regulatory 11 organization. 12 Q. Next bullet point it says, RLI branded 13 and specialty products. Are those branded 14 generics? 15 MR. GASTWIRTH: Objection to form. 16 THE DEPONENT: I assume it's branded 17 generics. 18 BY MR. FAUCI: 19 Q. Our RLI branded and specialty products 20 will become an important component of our 21 national and international business strategy. We 22 want to expand our support to these products by</p>	<p>192</p> <p>1 able to allow Roxane to benefit from the 2 expertise within BIPI. 3 But, again, I emphasize that the day- 4 to-day operations were conducted for the Roxane 5 branded products -- branded generic products 6 within the Roxane structure. 7 Q. Next bullet point it says, BIPI and RLI 8 contacting will be combined into a single 9 organization. What are BIPI and RLI contracting? 10 I'm on the next page, I'm sorry, the 11 last bullet point. 12 A. Okay. Again, these are the -- this is 13 the department that would set up contracts with 14 purchasing groups or distributors of the BIPI and 15 Roxane products. 16 Q. What do you mean set up contracts? 17 A. Again, if there was a -- a distribution 18 agreement that was negotiated with a purchasing 19 group or a wholesaler or a -- you know, any other 20 distributor, that a contract would be put 21 together representing the terms of the agreement 22 between the two parties.</p>
<p>191</p> <p>1 increasing the degree of collaboration between 2 the marketing of RLI product lines and BIPI 3 product lines. Do you see that? 4 A. Yes, I do. 5 Q. How would increasing the degree of 6 collaboration between Roxane and BIPI marketing 7 be beneficial? 8 A. Again, this was specific to the branded 9 -- RLI branded products. So at that time BIPI of 10 course had a much greater expertise and 11 experience in marketing these types of products. 12 Keep in mind that Roxane was made up of 13 a couple different types of businesses. The 14 multi-source, which was very -- and then they had 15 these so-called branded generics, which they 16 hoped to market more along the lines of a true 17 original brand such as contained in the BIPI 18 product line. 19 And strategically we made the decision, 20 fine, let's see what we could do and it made 21 sense to combine, you know, at certain levels the 22 reporting relationship to add to be able -- to be</p>	<p>193</p> <p>1 Q. Next sentence it says, John Powers will 2 lead the day-to-day management of this operation. 3 He did lead the day-to-day management for BIPI 4 and Roxane? 5 MR. GASTWIRTH: Objection to form. 6 THE DEPONENT: You know, I recall that 7 he was predominantly involved on the Roxane's 8 products, but I can't recall specifically beyond 9 that. 10 BY MR. FAUCI: 11 Q. You drafted this document, correct? 12 A. I did. This was also ten years ago. 13 Q. I'm going to ask you to go back to the 14 second page. The first page of this document, 15 second page of the exhibit. 16 A. Right. 17 Q. By the year 2004, very beginning, our 18 ethical pharmaceutical business is expected to 19 generate in the USA more than 40 percent of 20 Boehringer Ingelheim's worldwide ethical 21 pharmaceutical business. I'm just trying to 22 understand what that means. Can you tell me what</p>

<p>226</p> <p>1 A. I believe it was -- The committee was 2 put in place certainly for BIPI products, but I 3 don't want to say that I'm absolutely sure it was 4 for Roxane only because of what I told you 5 previously. I knew that there were discussions 6 taking place to divest of part of the branded 7 generic line and -- relative to Viramune. So I'm 8 not -- my memory fails me. I'm not a hundred 9 percent sure.</p> <p>10 Q. You can put that aside now for real.</p> <p>11 A. Okay.</p> <p>12 Q. Are you familiar with the</p> <p>13 pharmaceutical product known as Furosemide?</p> <p>14 A. As an ex-pharmacist, yes.</p> <p>15 Q. When were you a pharmacist?</p> <p>16 A. Many years ago. I graduated with a 17 pharmacy degree. I really didn't -- I practiced 18 for an extremely short period of time.</p> <p>19 Q. What is Furosemide?</p> <p>20 A. Furosemide is a generic name for a 21 diuretic, a so-called water pill.</p> <p>22 Q. Was it a BIPI product?</p>	<p>228</p> <p>1 Judy Waterer. It says, Attached is a document 2 called standby statement, Furosemide price 3 change. Do you see that?</p> <p>4 MR. GASTWIRTH: Objection. Form.</p> <p>5 THE DEPONENT: Yes, I do.</p> <p>6 MR. GASTWIRTH: I believe you just 7 switched the from and the to.</p> <p>8 BY MR. FAUCI:</p> <p>9 Q. Fair enough. The document is from Judy 10 Waterer to Lesli Paoletti. I stand corrected.</p> <p>11 It says, Here's a shot at it, please 12 make modifications as you see fit, then pass it 13 by Pam Demala. Who's Pam Demala?</p> <p>14 A. Pam Demala was a BIPI -- either BIPI or 15 BIC employee, I'm not sure, but certainly within 16 the BI side, in the public relations area.</p> <p>17 Q. Why would a Furosemide price change be 18 passed by Pam Demala?</p> <p>19 A. I haven't got a clue.</p> <p>20 Q. And it says that, You may need to call 21 her and let her know the background, she'll 22 probably want to pass it by Berkle and Russillo</p>
<p>227</p> <p>1 A. No, it was not.</p> <p>2 Q. Do you know if it was a Roxane product?</p> <p>3 A. I think it was within the Roxane multi- 4 source product line.</p> <p>5 Q. It's not a brand of generic, is it?</p> <p>6 A. It is not.</p> <p>7 Q. I'm going to hand you Exhibit Number 8 32.</p> <p>9 (Exhibit Berkle 032 was marked.)</p> <p>10 THE DEPONENT: Okay.</p> <p>11 BY MR. FAUCI:</p> <p>12 Q. Are you familiar with this document?</p> <p>13 A. No, I'm not.</p> <p>14 Q. Who's Judy Waterer again?</p> <p>15 A. She was a Roxane employee.</p> <p>16 Q. Do you know who Lesli Paoletti was?</p> <p>17 A. You know, the name is vaguely familiar, 18 but I couldn't even tell you what position she 19 held. She was a Roxane employee.</p> <p>20 Q. She was at Roxane?</p> <p>21 A. Yeah.</p> <p>22 Q. It's an e-mail from Lesli Paoletti to</p>	<p>229</p> <p>1 as well. Any idea why Ms. Waterer would think 2 that Pam Demala would want to pass it by you?</p> <p>3 A. I don't know. And the only other 4 comment I would make is I'm not sure in the 5 timing but there's somewhere in 2000 that we -- 6 we totally changed the structure of the 7 organization and I really was no longer involved 8 in the Roxane business after that point in time. 9 So I don't know whether this coincides with that 10 time period or not.</p> <p>11 Q. Do you remember around this time Roxane 12 -- Do you have any knowledge about the fact that 13 around this time Roxane raised the AWPs for its 14 Furosemide products?</p> <p>15 MR. GASTWIRTH: Objection. Form. I'm 16 sorry. Can I hear that back, please.</p> <p>17 (Record was read by the court 18 reporter.)</p> <p>19 MR. FAUCI: I can read it again if 20 you'd like.</p> <p>21 MR. GASTWIRTH: Thanks.</p> <p>22 BY MR. FAUCI:</p>

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<p>1 Q. Do you have any recollection whether 2 around the 2000 time frame Roxane raised the AWPs 3 for its Furosemide products?</p> <p>4 A. I'm not aware.</p> <p>5 Q. We can move on from that document.</p> <p>6 Can we go off the record for two 7 minutes.</p> <p>8 THE VIDEOGRAPHER: It's 3:14. We're 9 going off the record.</p> <p>10 (Short break was taken.)</p> <p>11 (Exhibit Berkle 033 was marked.)</p> <p>12 THE VIDEOGRAPHER: It's 3:28. We're 13 going back on the record.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. Mr. Berkle, I've handed you what's been 16 marked as Exhibit 33.</p> <p>17 A. Yes.</p> <p>18 Q. Can you take a moment to familiarize 19 yourself with it.</p> <p>20 A. Okay.</p> <p>21 Q. What's the subject line of this e-mail?</p> <p>22 A. It says Furosemide tablet AWP</p>	<p>1 A. Fred was a Roxane employee.</p> <p>2 Q. And it's sent to you, Shelly Berkle?</p> <p>3 A. Yes, it is.</p> <p>4 Q. Subject, Roxicodone 15/30mg launch 5 plan. Do you see that?</p> <p>6 A. Yes, I do.</p> <p>7 Q. And then does the attachment to this e- 8 mail appear to be a launch plan for Roxicodone?</p> <p>9 A. It certainly appears to be at least a 10 summary of a launch plan. Highlights.</p> <p>11 Q. Is Roxicodone a Roxane product?</p> <p>12 A. Yes, it was.</p> <p>13 Q. Second sentence of the e-mail, The 14 strategy is essentially what you saw in 15 Tarrytown. What's Tarrytown?</p> <p>16 A. It's -- Tarrytown is a town in New York 17 State close -- just across the border from 18 Connecticut.</p> <p>19 Q. What brought you to Tarrytown?</p> <p>20 A. I'm sorry?</p> <p>21 Q. What brought you to Tarrytown?</p> <p>22 A. Well, there's a conference that was</p>
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<p>310</p> <p>1 A. Again, as I testified earlier during 2 the day, on a strategic level, but I was not 3 involved on the -- in the day-to-day operations 4 and certainly not involved in the pricing 5 decisions in general.</p> <p>6 Q. Do you still have your exhibits handy?</p> <p>7 A. They're on the floor next to me.</p> <p>8 Q. Okay. May I ask you just to put them</p> <p>9 up on the table. I'm going to refer to a few of</p> <p>10 them now.</p> <p>11 A. Sure.</p> <p>12 Q. If I can draw your attention to Exhibit</p> <p>13 35, please.</p> <p>14 A. Okay.</p> <p>15 Q. Is Exhibit 35 a memorandum with the</p> <p>16 subject heading recommended pricing Roxicodone?</p> <p>17 A. Yes.</p> <p>18 Q. And it's dated August 22nd, 2000?</p> <p>19 A. Yes.</p> <p>20 Q. Do you recall that Mr. Fauci asked you</p> <p>21 some questions about this document?</p> <p>22 A. Yes, I do.</p>	<p>312</p> <p>1 where I was not involved in pricing for multi- 2 source products in general.</p> <p>3 Q. Can I direct your attention to the</p> <p>4 document that's been marked Exhibit 31, please.</p> <p>5 A. Okay. Got it.</p> <p>6 Q. This document is an e-mail dated May</p> <p>7 3rd, 2001 from Dan Gerrity, correct?</p> <p>8 A. Correct.</p> <p>9 Q. And it says, Please review the attached</p> <p>10 draft pricing policy?</p> <p>11 A. Yes.</p> <p>12 Q. And behind it -- behind the first page</p> <p>13 there beginning on page D0120629 there appears to</p> <p>14 be a pricing policy and procedure memorandum.</p> <p>15 A. Yes, I see that.</p> <p>16 Q. Do you know if this pricing policy and</p> <p>17 procedure memorandum was actually ever finalized?</p> <p>18 A. I can't recall whether it was finalized 19 in this -- precisely the same way as it is laid 20 out here. There was a procedure put in place, 21 but I certainly don't recall whether it was 22 exactly the same as -- as outlined.</p>
<p>311</p> <p>1 Q. Do you see that there's some signature</p> <p>2 blocks on the bottom of this first page?</p> <p>3 A. Yes, I do.</p> <p>4 Q. Can you please tell me who those</p> <p>5 signature blocks appear to be for.</p> <p>6 A. One is for myself and one is for my 7 immediate boss Werner Gerstenberg.</p> <p>8 Q. Does the signature actually appear</p> <p>9 under your name with respect to this recommended</p> <p>10 pricing for Roxicodone document?</p> <p>11 A. No, it does not.</p> <p>12 Q. Earlier this afternoon you testified</p> <p>13 that your focus would have been on WAC in</p> <p>14 connection with your involvement at BIPI,</p> <p>15 correct?</p> <p>16 MR. FAUCI: Objection. Form.</p> <p>17 THE DEPONENT: Yes.</p> <p>18 BY MR. GASTWIRTH:</p> <p>19 Q. Would you have ever been focused on WAC</p> <p>20 with respect to Roxane's multi-source business?</p> <p>21 A. No. I just reiterate what my question 22 was -- my answer was on the previous question</p>	<p>313</p> <p>1 Q. And does this pricing -- this draft</p> <p>2 pricing policy and procedure memorandum, does it</p> <p>3 relate to only brand products for Boehringer</p> <p>4 Ingelheim Pharmaceuticals, Inc., BIPI and Roxane?</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 THE DEPONENT: I believe that's true.</p> <p>7 MR. BREEN: Also objection leading.</p> <p>8 BY MR. GASTWIRTH:</p> <p>9 Q. I'd like to direct your attention to</p> <p>10 Exhibit 27, please.</p> <p>11 A. Yeah, I have it.</p> <p>12 Q. Okay. The last page of Exhibit 27,</p> <p>13 please.</p> <p>14 A. Okay.</p> <p>15 Q. Do you recall that Mr. Fauci earlier</p> <p>16 today directed you to -- your attention to the</p> <p>17 bullet point that begins BIPI -- about three</p> <p>18 paragraphs down, BIPI and RLI contracting will be</p> <p>19 combined into a single organization?</p> <p>20 A. Yes, I see that.</p> <p>21 Q. During the time period when you were</p> <p>22 employed by BIPI, did BIPI always enter into</p>

<p style="text-align: right;">314</p> <p>1 separate contracts with its customers?</p> <p>2 MR. FAUCI: Objection. Form.</p> <p>3 THE DEPONENT: Yes.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. Are you aware of whether Roxane entered 6 into separate contracts with its customers during 7 the time period that you were employed by BIPI?</p> <p>8 A. I believe so.</p> <p>9 Q. Mr. Fauci asked you a few questions 10 about documents that you produced in connection 11 with this litigation. Do you remember those?</p> <p>12 MR. FAUCI: Objection. Form.</p> <p>13 THE DEPONENT: I remember generally 14 some question relative to that.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. And do you recall that Mr. Fauci asked 17 you that when you left BIPI did anyone ask you to 18 look for any documents?</p> <p>19 A. Again, I don't remember the specific 20 question.</p> <p>21 Q. But you remember that kind of line of 22 inquiry?</p>	<p style="text-align: right;">316</p> <p>1 Exhibit 16.</p> <p>2 A. The one that says "In order to solve"?</p> <p>3 Q. Yes. Can you read that first line, 4 please.</p> <p>5 A. In order to solve this unique 6 situation, starting today BIPI will be billed -- 7 filling selected contracted Roxane Ipratropium 8 Bromide orders for a set period of time not to 9 exceed the end of 1996 or 300,000 units, bracket 10 boxes of 25, bracket.</p> <p>11 Q. Do you believe that the substitution of 12 Atrovent for Ipratropium Bromide was a unique 13 situation?</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 THE DEPONENT: Yeah. I would say 16 absolutely it was unique. It was a one-off 17 situation.</p> <p>18 BY MR. GASTWIRTH:</p> <p>19 Q. So you're not -- do you recall any 20 other instances when -- when BIPI drugs were 21 substituted for Roxane drugs?</p> <p>22 A. No, I do not.</p>
<p style="text-align: right;">315</p> <p>1 A. Yes.</p> <p>2 Q. Did you ever -- Did you leave your 3 documents at BIPI when you left the BIPI 4 organization?</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 THE DEPONENT: All my -- whatever 7 documents were in my possession I left at the 8 Boehringer offices.</p> <p>9 BY MR. GASTWIRTH:</p> <p>10 Q. Okay. And you understand that 11 documents have been produced in connection with 12 this litigation?</p> <p>13 A. Yes.</p> <p>14 Q. May I direct your attention to Exhibit 15 16, please.</p> <p>16 A. I have it.</p> <p>17 Q. Do you recall a line of inquiry by Mr. 18 Fauci concerning some substitution of Atrovent 19 for some Ipratropium Bromide sales?</p> <p>20 A. Yes.</p> <p>21 Q. Can I direct your attention to the 22 third paragraph, please, of this document,</p>	<p style="text-align: right;">317</p> <p>1 Q. As executive vice president for BIPI 2 would it have been important for you to 3 understand the release of the generic Ipratropium 4 Bromide product by Roxane?</p> <p>5 A. Yes. Absolutely.</p> <p>6 Q. Why?</p> <p>7 A. Again, BIPI marketed the Atrovent 8 brand. It was an important revenue driver. BIPI 9 was aware that the patent would be ending -- 10 exclusivity would be ending at a specific period 11 of time. Also Roxane being a sister company we 12 believed that by working together we could 13 benefit the overall BI U.S. family of companies 14 in the long term if we could work together.</p> <p>15 Q. As executive VP for BIPI did you have 16 any involvement in the setting of prices for the 17 Ipratropium Bromide, the generic?</p> <p>18 A. The generic? No, I didn't.</p> <p>19 Can I qualify that I was aware, you 20 know, of the price that was ultimately set for 21 that because of the joint interest of both 22 parties.</p>

<p style="text-align: right;">318</p> <p>1 Q. Did you ever tell Roxane what the 2 prices should be for Ipratropium Bromide though 3 as executive VP of BIPI?</p> <p>4 A. No, I didn't.</p> <p>5 Q. At the very beginning of today you 6 described BIPI and Roxane as being two separate 7 businesses in 1994.</p> <p>8 A. That's correct.</p> <p>9 Q. During your entire tenure at BIPI, so 10 from 1994 to 2003, do you believe that Roxane and 11 BIPI remained two separate businesses?</p> <p>12 MR. FAUCI: Objection. Form.</p> <p>13 MR. BREEN: Objection. Form.</p> <p>14 THE DEPONENT: Yes, I do.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Do you believe that BIPI and Roxane 17 were two separate businesses from the time period 18 1994 until 2003?</p> <p>19 MR. BREEN: Objection. Form.</p> <p>20 MR. FAUCI: Objection. Form.</p> <p>21 THE DEPONENT: Yes, I do.</p> <p>22 BY MR. GASTWIRTH:</p>	<p style="text-align: right;">320</p> <p>1 employees?</p> <p>2 A. Yes, they did.</p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. Did Roxane and BIPI have separate 6 payrolls?</p> <p>7 MR. BREEN: Objection.</p> <p>8 MR. FAUCI: Objection. Form.</p> <p>9 THE DEPONENT: I believe so. As far as 10 I know.</p> <p>11 BY MR. GASTWIRTH:</p> <p>12 Q. Did BIPI and Roxane sell different 13 drugs?</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 THE DEPONENT: Yes.</p> <p>16 BY MR. GASTWIRTH:</p> <p>17 Q. Did BIPI sell different drugs from 18 Roxane?</p> <p>19 A. Yes. Again, just going back to the 20 previous question, other than, you know, when you 21 mean drug, Ipratropium obviously was a similar 22 chemical entity.</p>
<p style="text-align: right;">319</p> <p>1 Q. Mr. Berkle, during your tenure at BIPI 2 did you view Roxane, BIPI and BIC as separate 3 independent companies?</p> <p>4 MR. FAUCI: Objection. Form.</p> <p>5 THE DEPONENT: Yes, I did.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. Did you treat -- During your tenure at 8 BIPI did you treat Roxane, BIPI and BIC as 9 separate independent companies?</p> <p>10 A. Yes.</p> <p>11 Q. Did Roxane have separate offices from 12 BIPI?</p> <p>13 A. Yes.</p> <p>14 Q. Where were Roxane's offices located?</p> <p>15 A. Columbus, Ohio.</p> <p>16 Q. Where were BIPI's offices located?</p> <p>17 A. Ridgefield, Connecticut.</p> <p>18 Q. Did BIC have separate offices from both 19 BIPI and Roxane?</p> <p>20 A. BIC was situated at Ridgefield, 21 Connecticut.</p> <p>22 Q. Did Roxane and BIPI have their own</p>	<p style="text-align: right;">321</p> <p>1 Q. But there was a separate Ipratropium 2 Bromide generic in Atrovent which was a brand of 3 generic, correct?</p> <p>4 A. There was a differentiation based on 5 label.</p> <p>6 Q. Can you please explain the 7 differentiation -- Strike that.</p> <p>8 How were the drugs that were sold by 9 Roxane and BIPI different during the time period 10 that you were employed at BIPI?</p> <p>11 A. BIPI sold unique original -- original 12 researched compounds and one -- one-unique, one 13 only type drugs. And Roxane sold predominantly 14 products that were multi-source, meaning that 15 they were multiple competitors of the same 16 chemical entity on the marketplace.</p> <p>17 Q. Do you believe that the prices are set 18 differently for branded drugs as compared to 19 generic drugs?</p> <p>20 MR. FAUCI: Objection. Form.</p> <p>21 THE DEPONENT: I believe so.</p> <p>22 BY MR. GASTWIRTH:</p>

<p style="text-align: right;">322</p> <p>1 Q. Did Roxane have different customers to 2 your knowledge as compared to BIPI?</p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 THE DEPONENT: Yes, they did have 5 different customers.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. How so?</p> <p>8 A. They probably had a broader breadth of 9 customers as opposed to BIPI. BIPI sold 10 predominantly through wholesalers only, and 11 Roxane because of the nature of their business, 12 generic business, certainly sold through 13 wholesalers but other types of distributors as 14 well. Although, again, for a period of time that 15 I can recall a good bulk of the business for 16 Roxane was directed through wholesales.</p> <p>17 Q. Did BIPI have financial statements?</p> <p>18 A. Yes, they did.</p> <p>19 Q. Was BIPI's financial statements 20 separate from Roxane?</p> <p>21 A. Yes, they were.</p> <p>22 Q. Did BIPI have business plans?</p>	<p style="text-align: right;">324</p> <p>1 BY MR. GASTWIRTH:</p> <p>2 Q. Did Roxane and BIPI have their own 3 marketing departments?</p> <p>4 A. Yes.</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. Did Roxane and BIPI have their own 8 contract departments?</p> <p>9 A. Yes.</p> <p>10 Q. Mr. Berkle, during your tenure at BIPI 11 did you ever have any day-to-day operational 12 responsibility for Roxane's generic business?</p> <p>13 A. No, I didn't.</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. I'm sorry. Can you repeat your answer, 17 please.</p> <p>18 A. No, I did not.</p> <p>19 Q. Mr. Berkle, in your position as VP of 20 BIC, did you ever have any day-to-day operational 21 responsibility for Roxane's generic business?</p> <p>22 A. No, I did not.</p>
<p style="text-align: right;">323</p> <p>1 A. Yes, they did.</p> <p>2 Q. Do you know if Roxane had business 3 plans?</p> <p>4 A. Yes, they did.</p> <p>5 Q. Would BIPI's business plans have been 6 different than Roxane's business plans?</p> <p>7 A. Yes.</p> <p>8 MR. FAUCI: Objection. Form.</p> <p>9 BY MR. GASTWIRTH:</p> <p>10 Q. Did BIPI have growth forecasts?</p> <p>11 A. Yes.</p> <p>12 Q. Did Roxane have growth forecasts?</p> <p>13 A. Yes.</p> <p>14 Q. Would BIPI's growth forecast have been 15 different than Roxane's forecast?</p> <p>16 MR. FAUCI: Objection. Form.</p> <p>17 THE DEPONENT: Yes.</p> <p>18 BY MR. GASTWIRTH:</p> <p>19 Q. Did Roxane and BIPI have their own 20 sales forces?</p> <p>21 MR. BREEN: Objection. Form.</p> <p>22 THE DEPONENT: Yes.</p>	<p style="text-align: right;">325</p> <p>1 Q. Mr. Berkle, do you believe that BIC had 2 any day-to-day operational responsibility over 3 Roxane's business?</p> <p>4 A. No, I do not.</p> <p>5 Q. Mr. Berkle, do you believe that the 6 German parent of Boehringer had any day-to-day 7 operational responsibility over BIPI's business?</p> <p>8 A. No, I do not.</p> <p>9 Q. Mr. Berkle, do you believe that the 10 German parent of Boehringer had any day-to-day 11 operational responsibility over Roxane?</p> <p>12 A. No, I do not.</p> <p>13 Q. Mr. Berkle, did BIPI have a board of 14 directors?</p> <p>15 A. Yes, it did.</p> <p>16 Q. Did Roxane have a board of directors?</p> <p>17 A. Yes, it did.</p> <p>18 Q. Were they separate board of directors?</p> <p>19 That is, the board of directors for Roxane was 20 separate from the board of directors of BIPI?</p> <p>21 MR. FAUCI: Objection. Form.</p> <p>22 THE DEPONENT: Yes, it was.</p>

<p>326</p> <p>1 BY MR. GASTWIRTH:</p> <p>2 Q. And the board of directors for BIPI had</p> <p>3 meetings?</p> <p>4 A. I believe --</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 THE DEPONENT: I believe it did.</p> <p>7 BY MR. GASTWIRTH:</p> <p>8 Q. And did the board of directors for</p> <p>9 Roxane have meetings?</p> <p>10 A. I believe it did.</p> <p>11 Q. Would the board of directors' meetings</p> <p>12 for Roxane and BIPI have occurred at different</p> <p>13 times?</p> <p>14 A. I believe that's true.</p> <p>15 Q. Roxane had some officers, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Roxane had executives?</p> <p>18 A. Yes.</p> <p>19 Q. And BIPI had officers?</p> <p>20 A. Yes.</p> <p>21 Q. And BIPI had executives?</p> <p>22 A. Yes.</p>	<p>328</p> <p>1 that involved what counsel said, but stop before</p> <p>2 you answer and let counsel have an chance to</p> <p>3 object because he may have some attorney-client</p> <p>4 privilege objections.</p> <p>5 And -- And after I finished my</p> <p>6 examination today, a few minutes ago, you did</p> <p>7 have an opportunity to consult with counsel,</p> <p>8 correct?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And so first question, with</p> <p>11 respect to the -- your testimony that you believe</p> <p>12 Roxane had a board of directors, without going</p> <p>13 into any discussions with counsel, can you tell</p> <p>14 me who was on that board?</p> <p>15 A. I'll go back to I think I responded</p> <p>16 earlier this morning that certainly Mr.</p> <p>17 Gerstenberg was on that board, I was on that</p> <p>18 board. But beyond that, I really don't recall.</p> <p>19 Q. So you and Gerstenberg were on the</p> <p>20 Roxane board?</p> <p>21 A. Correct.</p> <p>22 Q. And when did you have your last board</p>
<p>327</p> <p>1 Q. And BIC had a board of directors,</p> <p>2 correct?</p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 THE DEPONENT: That's correct.</p> <p>5 BY MR. GASTWIRTH:</p> <p>6 Q. Mr. Berkle, who was the head of Roxane</p> <p>7 during your employment at BIPI?</p> <p>8 A. That differed at different time</p> <p>9 periods. Certainly when I first came to the U.S.</p> <p>10 it was Jerry Wojta who was the president. There</p> <p>11 was a period of time that Ed Tupa was the senior</p> <p>12 manager at -- at Roxane. And then certainly Tom</p> <p>13 Russillo was the -- was the head of Roxane</p> <p>14 Laboratories.</p> <p>15 MR. GASTWIRTH: Just take a moment.</p> <p>16 I have no further questions.</p> <p>17 MR. BREEN: Just a few follow-up based</p> <p>18 upon that.</p> <p>19</p> <p>20 EXAMINATION</p> <p>21 BY MR. BREEN:</p> <p>22 Q. I'm going to ask a couple questions</p>	<p>329</p> <p>1 meeting for Roxane?</p> <p>2 A. I have no idea.</p> <p>3 Q. Do you have a present recollection of</p> <p>4 sitting in a board meeting for Roxane</p> <p>5 Laboratories?</p> <p>6 A. Very vague.</p> <p>7 Q. How many times did you have board</p> <p>8 meetings for Roxane Laboratories?</p> <p>9 A. Again, I was trying to think, and I</p> <p>10 don't recall the frequency of meetings.</p> <p>11 Q. How long were you on the board for</p> <p>12 Roxane Laboratories?</p> <p>13 A. Again, I don't know the number of</p> <p>14 years.</p> <p>15 Q. Was it one year?</p> <p>16 A. It was beyond one year, but I -- I just</p> <p>17 don't know.</p> <p>18 Q. Was it the entire tenure that you were</p> <p>19 with the company?</p> <p>20 A. I don't believe so.</p> <p>21 Q. Where did you have the board meetings</p> <p>22 at?</p>

<p>354</p> <p>1 directors for Roxane is identified?</p> <p>2 MS. ROGERS: Objection. Form.</p> <p>3 THE DEPONENT: Yes, it does.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. And what is the date of this corporate</p> <p>6 data sheet?</p> <p>7 A. 6/21/99.</p> <p>8 Q. Does this corporate data sheet identify</p> <p>9 the board of directors for Roxane as of 6/21/99?</p> <p>10 A. It appears to.</p> <p>11 Q. And who were the corporate directors as</p> <p>12 of 6/21/99 for Roxane?</p> <p>13 A. Mr. Gerstenberg, Mr. Poerschmann and</p> <p>14 myself.</p> <p>15 Q. Okay. Now, Mr. Breen also suggested</p> <p>16 that BIPI's board did not have annual meetings.</p> <p>17 And --</p> <p>18 MR. FAUCI: Objection. Form.</p> <p>19 BY MR. GASTWIRTH:</p> <p>20 Q. -- I don't have all --</p> <p>21 MR. BREEN: Objection. Form. You miss</p> <p>22 -- Counsel, you mischaracterized what I said. I</p>	<p>356</p> <p>1 it's true based on this document.</p> <p>2 BY MR. GASTWIRTH:</p> <p>3 Q. And does this document also have a</p> <p>4 resolution for adoption of appointment of</p> <p>5 officers?</p> <p>6 A. It does.</p> <p>7 Q. And were officers adopted at this</p> <p>8 annual meeting for the board of directors for</p> <p>9 BIPI?</p> <p>10 MR. FAUCI: Objection. Form.</p> <p>11 THE DEPONENT: Yes, they were.</p> <p>12 BY MR. GASTWIRTH:</p> <p>13 Q. And were you one of the officers that</p> <p>14 was -- that was appointed at this annual meeting</p> <p>15 that occurred on June 24, 2003 for BIPI?</p> <p>16 A. Yes, I was.</p> <p>17 Q. Does this document refresh your</p> <p>18 recollection as to whether BIPI had annual</p> <p>19 meetings of board of directors?</p> <p>20 MR. BREEN: Objection. Form.</p> <p>21 MR. FAUCI: Objection. Form.</p> <p>22 THE DEPONENT: Certainly I knew there</p>
<p>355</p> <p>1 asked this witness questions to test his</p> <p>2 knowledge based upon testimony that you elicited,</p> <p>3 Counsel. So please stop mischaracterizing</p> <p>4 anything I said. You asked the man questions, he</p> <p>5 gave you answers, I tested his knowledge. That's</p> <p>6 it.</p> <p>7 MR. GASTWIRTH: What exhibit are we on?</p> <p>8 42? If you can mark that Exhibit 42, please.</p> <p>9 (Exhibit Berkle 042 was marked.)</p> <p>10 MR. FAUCI: Do you have a copy of it?</p> <p>11 MR. GASTWIRTH: I'm going to give it to</p> <p>12 you in one second.</p> <p>13 BY MR. GASTWIRTH:</p> <p>14 Q. Exhibit 42 states BIPI annual meeting</p> <p>15 of the board of directors June 24th, 2003,</p> <p>16 correct?</p> <p>17 A. Correct.</p> <p>18 Q. Based on this document, do you believe</p> <p>19 that there was an annual meeting of the board of</p> <p>20 directors for BIPI on June 24th, 2003?</p> <p>21 MR. BREEN: Objection. Form.</p> <p>22 THE DEPONENT: I would believe that</p>	<p>357</p> <p>1 was meetings. You know, my -- I couldn't</p> <p>2 recollect the frequency, but it appears to be at</p> <p>3 least there was an annual meeting.</p> <p>4 MR. GASTWIRTH: I am going to give you</p> <p>5 -- If I could ask the court reporter to mark the</p> <p>6 next one, two, three, four exhibits, 43, 44, 45</p> <p>7 and 46, that would be great. Thank you.</p> <p>8 (Exhibit Berkle 043, Exhibit Berkle</p> <p>9 044, Exhibit Berkle 045 and Exhibit Berkle 046</p> <p>10 were marked.)</p> <p>11 MR. BREEN: Do you have any of these</p> <p>12 for Roxane?</p> <p>13 MR. GASTWIRTH: I'm going through these</p> <p>14 right now.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Now, again, Mr. Berkle this is just</p> <p>17 what I could locate in my car in response to the</p> <p>18 suggestion that Roxane didn't have board of</p> <p>19 minutes direct -- meetings of the board of</p> <p>20 directors, BIC didn't and BIPI didn't.</p> <p>21 MR. BREEN: Counsel, I'm going to</p> <p>22 object to the form.</p>

<p style="text-align: right;">358</p> <p>1 MR. FAUCI: I completely agree.</p> <p>2 MR. BREEN: And I have had it with this</p> <p>3 mischaracterization. You asked the man a</p> <p>4 question, I cross-examined to test his knowledge.</p> <p>5 I don't want to hear about what's in your car or</p> <p>6 what -- or you characterizing this stuff on the</p> <p>7 record. That's totally improper. And it's</p> <p>8 totally improper coaching also.</p> <p>9 MR. FAUCI: You have the documents you</p> <p>10 have. Ask questions about them.</p> <p>11 MR. BREEN: So you can ask questions,</p> <p>12 but stop mischaracterizing anything I</p> <p>13 represented. I don't appreciate it.</p> <p>14 BY MR. GASTWIRTH:</p> <p>15 Q. Does -- Exhibit 43, Mr. Berkle, is it</p> <p>16 an agenda for Boehringer Ingelheim Corporation,</p> <p>17 BIC, the board of directors meeting for June 6,</p> <p>18 1995?</p> <p>19 A. For July 6, 1995.</p> <p>20 MR. BREEN: Objection. Form.</p> <p>21 THE DEPONENT: It appears to be.</p> <p>22 BY MR. GASTWIRTH:</p>	<p style="text-align: right;">360</p> <p>1 A. That's correct.</p> <p>2 Q. Can you please flip to page 17 through</p> <p>3 22 of this document. Did I mark that section?</p> <p>4 A. Yeah, here.</p> <p>5 Q. Okay. When you were talking earlier</p> <p>6 about financial statements that were prepared by</p> <p>7 the separate Boehringer entities, does pages 40 -</p> <p>8 - 17 through 21 I believe represent financial</p> <p>9 statements for Roxane?</p> <p>10 A. It appears to be, yes.</p> <p>11 MR. FAUCI: Objection. Form. Please</p> <p>12 stop leading the witness.</p> <p>13 THE DEPONENT: It appears to be true</p> <p>14 what you asked.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Okay. And can I direct your attention</p> <p>17 to the next exhibit, please.</p> <p>18 A. Uh-huh.</p> <p>19 Q. Exhibit 46.</p> <p>20 A. Oh, sorry. Okay.</p> <p>21 Q. Exhibit 46 is labeled minutes of the</p> <p>22 meeting of the board of directors Boehringer</p>
<p style="text-align: right;">359</p> <p>1 Q. Okay. And if I could direct your</p> <p>2 attention to Exhibit 44, please. Is Exhibit 44</p> <p>3 minutes of the meeting of the board of directors</p> <p>4 for BIC July 16th, 1996?</p> <p>5 MR. FAUCI: Objection. Foundation.</p> <p>6 THE DEPONENT: It appears to be.</p> <p>7 BY MR. GASTWIRTH:</p> <p>8 Q. Can you please tell me who the board</p> <p>9 members were for BIC July 16th, 1996.</p> <p>10 A. Chairman was Dr. Louis Fernandez, Mr.</p> <p>11 Gerstenberg, Dr. Thomas Heil, Dr. Claus Rohleder,</p> <p>12 Dr. Jere Goyan and Mr. Vaughn Bryson.</p> <p>13 Q. Can I direct your attention to Exhibit</p> <p>14 45, please.</p> <p>15 A. Okay.</p> <p>16 Q. Exhibit 45 at the top says Boehringer</p> <p>17 Ingelheim Corporation meeting of the board of</p> <p>18 directors February 28th, 1997.</p> <p>19 A. That's correct.</p> <p>20 Q. Earlier today you testified as to</p> <p>21 financial statements being prepared for some of</p> <p>22 the Bert -- Boehringer entities, correct?</p>	<p style="text-align: right;">361</p> <p>1 Ingelheim Corporation October 28th, 1998?</p> <p>2 A. Correct.</p> <p>3 Q. Can you please identify who the board</p> <p>4 members were for BIC as of October 28th, 1998?</p> <p>5 A. I believe it's the same list. Dr.</p> <p>6 Fernandez as chairman, Dr. -- Mr. Gerstenberg,</p> <p>7 Dr. Jo -- no, it's somewhat different, Dr.</p> <p>8 Johann, Dr. Heil, Dr. Goyan and Mr. Bryson.</p> <p>9 Q. And how many pages is the minutes for</p> <p>10 this board meeting of BIC?</p> <p>11 A. I don't know if I can make that out.</p> <p>12 The actual minutes were 17 pages.</p> <p>13 Q. And do the minutes reflect what took</p> <p>14 place at this board of directors meeting?</p> <p>15 MR. FAUCI: Objection. Foundation.</p> <p>16 THE DEPONENT: I assume --</p> <p>17 MR. FAUCI: How is he supposed to</p> <p>18 answer that?</p> <p>19 BY MR. GASTWIRTH:</p> <p>20 Q. Okay. Mr. Berkle, were you invited to</p> <p>21 attend this meeting of the board of directors for</p> <p>22 BIC on October 28th, 1998? You can look at the</p>

<p>362</p> <p>1 first page.</p> <p>2 A. I was invited for a portion of this</p> <p>3 meeting.</p> <p>4 Q. Do you recall this meeting now? Does</p> <p>5 this document refresh your recollection?</p> <p>6 A. I don't recall the specific meeting,</p> <p>7 but I think I've testified earlier that I did sit</p> <p>8 in frequently at BIC board meetings for a portion</p> <p>9 of them when I was invited.</p> <p>10 MR. GASTWIRTH: Okay. I have no</p> <p>11 further questions.</p> <p>12</p> <p>13 EXAMINATION</p> <p>14 BY MR. BREEN:</p> <p>15 Q. All right. Just a few based upon that.</p> <p>16 I see a bunch of agendas here and</p> <p>17 minutes of meetings of the board of directors of</p> <p>18 Boehringer Ingelheim Corporation.</p> <p>19 A. Uh-huh.</p> <p>20 Q. Could you go through that stack of</p> <p>21 things that counsel says he got out of his car</p> <p>22 and pull out all the minutes of meetings of BIPI</p>	<p>364</p> <p>1 board meetings of Roxane or BIPI.</p> <p>2 A. The Roxane documents reflect directors</p> <p>3 and officers for Roxane. There are no minutes</p> <p>4 attached.</p> <p>5 Q. Now, the fact of the matter is that</p> <p>6 none of these documents cause you to sit here</p> <p>7 right now and remember any -- attending any</p> <p>8 particular board meeting for any particular</p> <p>9 company, does it?</p> <p>10 MR. GASTWIRTH: Objection. Form.</p> <p>11 THE DEPONENT: As I said, I was not a</p> <p>12 member of the board of directors for BIPI. I was</p> <p>13 for Roxane, but I -- you know, I've stated before</p> <p>14 and I'll stick to my statement that I don't</p> <p>15 recall specifics.</p> <p>16 BY MR. BREEN:</p> <p>17 Q. I understand that. I'm not -- I'm not</p> <p>18 arguing that, but counsel's questions were --</p> <p>19 several times he said, quote, Does this refresh</p> <p>20 your recollection. That means something under</p> <p>21 the rules of evidence, so I just want the record</p> <p>22 to be clear.</p>
<p>363</p> <p>1 and all the meetings of minutes of Roxane's</p> <p>2 boards.</p> <p>3 A. Here's BIPI.</p> <p>4 Q. Was that a -- minutes of a meeting or</p> <p>5 is that just a list of people that are appointed</p> <p>6 to the board?</p> <p>7 A. The pages I have really is a resolution</p> <p>8 for adoption of appointment of officers at the</p> <p>9 annual meeting of the board of directors for</p> <p>10 BIPI.</p> <p>11 Q. Any minutes of a meeting there in that</p> <p>12 document?</p> <p>13 A. No.</p> <p>14 Q. Not like you saw for BIC, right? For</p> <p>15 BIC they've got -- they've got all these minutes</p> <p>16 and agendas and all that stuff, right?</p> <p>17 A. Well, in this particular document, no,</p> <p>18 there's no minutes attached.</p> <p>19 Q. Okay. Well, go through all -- Take</p> <p>20 your time because counsel brought all these</p> <p>21 documents in from the trunk of his car, see if</p> <p>22 there's any actual minutes and agendas of any</p>	<p>365</p> <p>1 The exhibits that counsel has shown you</p> <p>2 in this -- since coming back into the room, none</p> <p>3 of that causes you to sit here and have a present</p> <p>4 recollection of having attended a particular</p> <p>5 meeting, does it?</p> <p>6 MR. GASTWIRTH: Objection. Form.</p> <p>7 BY MR. BREEN:</p> <p>8 Q. When I say present recollection, you're</p> <p>9 thinking back and in your own mind right now you</p> <p>10 remember a particular meeting and being there.</p> <p>11 A. I don't remember a specific meeting.</p> <p>12 Q. Okay. Now, this -- I'm not sure which</p> <p>13 exhibit -- May I reach over here?</p> <p>14 A. Sure.</p> <p>15 Q. I just want to speed things up a little</p> <p>16 bit. I think it's this one. Which one is this</p> <p>17 one, do you know? Which number?</p> <p>18 A. 45?</p> <p>19 MR. GASTWIRTH: No. It's --</p> <p>20 THE DEPONENT: Sorry.</p> <p>21 MR. BREEN: I'm sorry. It looks like</p> <p>22 it, but it's not that one.</p>